Supreme Court, U.S.
FILED
MAY 0 8 2000
CLERK

No. 99-1486

In the Supreme Court of the United States

SAC & FOX NATION OF OKLAHOMA, ET AL.,
PETITIONERS

v.

ANDREW CUOMO, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly held that petitioners had failed to establish an adequate jurisdictional basis for their suit.

2. Whether the district judge was required by law to recuse herself from participation in the case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 193 F.3d 1162. The opinion of the district court (Pet. App. 21-36) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1999. A petition for rehearing was denied on December 9, 1999 (Pet. App. 40). The petition for a writ of certiorari was filed on March 8, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of a dispute between three Indian Tribes in Oklahoma (petitioners in this Court)[1] and respondent Absentee Shawnee Housing Authority (ASHA) of the Absentee Shawnee Tribe (AST). Pet. App. 2-3 & n.1. The ASHA is a state entity established under the Oklahoma Housing Authorities Act, Okla. Stat. Ann. tit. 63, §§ 1051 *et seq.* (West 1997 & Supp. 1999). Pet. App. 4. The United States Department of Housing and Urban Development (HUD) supports the activities of ASHA and other tribal housing authorities under the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. 4101 *et seq.* (Supp. IV 1998).

Petitioners filed suit in federal district court, naming as defendants three HUD officers (respondents in this Court) and respondent ASHA. See Pet. App. 41-47 (Complaint). The gravamen of their suit was that respondent ASHA had illegally encroached upon their lands by purchasing houses located within the petitioners' reservation boundaries, and that HUD had acted unlawfully by permitting the encroachment to occur and by allocating federal funds to respondent ASHA for those activities. *Id.* at 45. The allegations of the complaint focused primarily on the circumstances of respondent ASHA's purported encroachment. *Id.* at 43-45. With respect to the federal defendants, the complaint alleged that the relevant HUD officials "have been continually advised of the ASHA's illegal encroachments on other tribes' areas, but have refused to

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[1] The petitioner Tribes are the Sac and Fox Nation Indian Tribe of Oklahoma, the Kickapoo Tribe of Oklahoma, and the Citizen Potowatomi Nation. Pet. App. 3 n.1.

halt the encroachments, and if not enjoined, will continue to allow these encroachments and allocate federal funding to the ASHA based thereon." *Id.* at 45. Petitioners alleged that "[j]urisdiction is based upon 28 U.S.C. 1331 and 28 U.S.C. 1362." *Id.* at 64. *Inter alia*, petitioners sought temporary and permanent injunctive relief precluding HUD "from allocating funding and allowing the operation of the ASHA outside of ASHA's legal area of operation," as well as an order directing HUD "to transfer all HUD projects in [petitioners'] operational/jurisdictional area to [petitioners]." *Id.* at 46.

2. The district court granted respondent ASHA's motion to dismiss the suit. Pet. App. 21-36. The court explained that

> [a] careful review of the complaint in this case reveals that [petitioners] do not plead any constitutional provision, federal law or treaty upon which federal question jurisdiction could rest. To the contrary, the only law at issue appears to be the Oklahoma Housing Authorities Act, [Okla. Stat. Ann. tit. 63, §§] 1051 *et seq.*, since the gist of [petitioners'] complaint is that ASHA is allegedly developing low income homes outside its "area of operation" as set out in the Oklahoma Housing Authorities Act.

Id. at 32. Because petitioners' "complaint fail[ed] to contain well-pleaded allegations that federal law creates [petitioners'] cause of action or that [petitioners'] right to relief depends on resolution of a substantial question of federal law," the court held that "the complaint must be dismissed for lack of federal question jurisdiction." *Id.* at 34. The court also stated that "[a]lthough [petitioners] attempt to put the focus

on the propriety, or not, of HUD's funding of ASHA, the propriety of such funding appears, from the complaint, to depend on a resolution of what is ASHA's proper area of operation under the Oklahoma Housing Authorities Act." *Id.* at 35-36.[2]

3. The court of appeals affirmed. Pet. App. 1-14. The court "first affirm[ed] the dismissal of the claims against ASHA." *Id.* at 8. It explained that

> those claims clearly present no federal question. [Petitioners] suggest no cause of action against ASHA that arises under or depends on the construction of any federal law. [Petitioners'] brief on appeal virtually concedes that only their claims against the federal defendants could conceivably pose a federal question.

Ibid.

The court of appeals "also h[e]ld that [petitioners'] complaint fails to articulate a substantial federal question with respect to those federal defendants." Pet. App. 8. The court explained that in the complaint itself, and in petitioners' subsequent brief in opposition to respondent ASHA's motion to dismiss, petitioners had "directed the district court to no specific federal law or regulation which they claimed was violated or which conferred federal question jurisdiction, nor did they articulate even in general terms how HUD could be liable for the claimed illegal activities of ASHA." *Id.* at 9. The court noted that petitioners had expressly disavowed reliance on the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* Pet. App. 9 n.4.

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[2] In the alternative, the court held that the complaint should be dismissed for failure to join the AST as an indispensable party. Pet. App. 36.

The court of appeals acknowledged that in a footnote in their appellate brief, petitioners had identified the HUD regulation (24 C.F.R. 1000.302) purportedly violated by the agency's provision of funding to respondent ASHA. Pet. App. 10. The court "decline[d] to construe [petitioners'] appellate brief as an amendment of their complaint," *id.* at 11, however, explaining that "it would unfairly burden the district court to expect that court to independently identify the correct federal jurisdictional basis or risk reversal on appeal," *id.* at 12. Because petitioners in their district court filings had not affirmatively demonstrated the existence of federal jurisdiction, the court of appeals affirmed the district court's dismissal of the complaint. *Ibid.*

The court of appeals also rejected petitioners' contention that the district judge had acted unlawfully in declining to recuse herself from the case. Pet. App. 13-14. The court stated that recusal was not required by the fact that the judge had served as United States Attorney for the Western District of Oklahoma at a time when that office participated in a case similar to this one. The court explained that recusal was not required on that basis because petitioners had "expressly disavow[ed] any knowledge that the district judge personally participated in any way in the particular prior case." *Id.* at 14. The court of appeals also held that "[n]othing in the district court's rulings in this case provides a reasonable basis from which to infer partiality." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. a. Under 28 U.S.C. 1331, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." For purposes of Section 1331, a case "aris[es] under" federal law only when "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983).[3] "[A] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully* v. *First Nat'l Bank*, 299 U.S. 109, 112 (1936). As the courts below correctly held, petitioners failed to establish either that federal law creates a cause of action or that their entitlement to relief depends on the resolution of any federal question.

With respect to their claims against the federal defendants, petitioners' complaint alleged only that the relevant HUD officials "have been continually advised of the ASHA's illegal encroachments on other tribes' areas, but have refused to halt the encroachments, and if not enjoined, will continue to allow these encroachments and allocate federal funding to the ASHA based thereon." Pet. App. 45. Petitioners' brief in opposition to respondent ASHA's motion to dismiss vaguely stated that "[a]llocation of federal funding by the Federal Defendants is certainly a federal question. What

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[3] Petitioners also invoked 28 U.S.C. 1362, which authorizes the district courts to adjudicate certain civil actions brought by Indian Tribes. See Pet. App. 64. Section 1362, like Section 1331, is limited to cases "wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

are the former reservation boundaries of an Indian tribe is certainly a question arising under treaties between the United States and other Indian tribes. The proper administration of a federal program is obviously a controversy arising under federal law." Plaintiffs' Brief in Opposition to the ASHA Motion to Dismiss at 5 (filed June 23, 1997). Those assertions are patently insufficient to satisfy the well-pleaded complaint rule. Petitioners did not identify any provision of law that required HUD to halt the ASHA's purported "encroachments" or prohibited HUD from dispensing federal funds to support the ASHA's activities.

Petitioners have failed, moreover, to identify any waiver of sovereign immunity that authorized their suit against the federal defendants to go forward. "Sovereign immunity is jurisdictional in nature." *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994); accord, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."). In the court of appeals, petitioners expressly disclaimed reliance on the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* —perhaps the most frequently invoked waiver of the federal government's sovereign immunity. See Pet. App. 9 n.4.[4]

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4 That concession appears well-advised. Although the complaint alleged in general terms that HUD has "refused to halt" respondent ASHA's purportedly illegal encroachments (Pet. App. 45), and that the agency "will continue to allow these encroachments and allocate federal funding to the ASHA" (*ibid.*), petitioners did not identify any "final agency action" (5 U.S.C. 704) that could serve as the focus of judicial review. Compare *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990) ("Under the terms of the APA, [a plaintiff] must direct its attack against some particular

b. Petitioners observe (Pet. 15) that federal question jurisdiction may sometimes be premised on an alleged violation of federal common law. Petitioners cite no judicial decision, however, suggesting that the action of an Executive Branch agency could be set aside based on a purported violation of common law rules. Nor would reliance on federal common law obviate the need for petitioners to identify an applicable waiver of sovereign immunity. In any event, petitioners' complaint did not allege, even in the most general terms, any violation of federal common law.

The fact that this case involves the affairs of Indian Tribes (Pet. 15) also does not obviate the need for petitioners to establish that their claims arise under federal law and that the federal government has waived its immunity from suit. That is particularly so in light of the fact that respondent ASHA "is technically an agency of the State of Oklahoma." Pet. App. 4. Indeed, petitioners' complaint recognized that Oklahoma law "determines the operational/jurisdictional area of an Indian housing authority created under Oklahoma law." *Id.* at 44.

Petitioners also suggest (Pet. 15-16) that their suit falls within the jurisdiction of the federal courts because "[t]he relief sought was against a federal agency concerning its allocations of federally-appropriated monies to Indian tribes." But a federal agency, in dispensing federal funds, is under no general obligation to verify the recipient's compliance with all aspects of state law. In order to establish the existence of federal question jurisdiction, petitioners were required to identify a provision of federal law that prohibited

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'agency action' that causes it harm," rather than "seek[ing] wholesale improvement of [a government] program by court decree.").

HUD from funding projects undertaken outside a tribal housing authority's area of operation under state law. Petitioners' district court filings identified no such provision. See Pet. App. 9 (petitioners "directed the district court to no specific federal law or regulation which they claimed was violated or which conferred federal question jurisdiction, nor did they articulate even in general terms how HUD could be liable for the claimed illegal activities of ASHA"). And, as we explain above, petitioners failed to identify any waiver of sovereign immunity that would authorize a suit to enforce any funding prohibition that may have existed.

Finally, petitioners contend (Pet. 17) that "the Tenth Circuit's refusal to allow the alleged deficiency to be supplied on appeal acted contrary to decisions by this Court that complaints are to be liberally construed to do justice." The factbound question whether petitioners were given an adequate opportunity to remedy the deficiencies in their pleadings does not warrant this Court's review. In any event, the court of appeals can scarcely be said to have acted in a draconian fashion by declining to allow supplementation on appeal of a complaint that failed to identify either the provision of law that HUD was alleged to have violated or the waiver of sovereign immunity that would permit the suit to go forward. As the court of appeals recognized, "it would unfairly burden the district court to expect that court to independently identify the correct federal jurisdictional basis or risk reversal on appeal." Pet. App. 12.

2. Petitioners argue (Pet. 19-30) that District Judge Miles-LaGrange was obligated to recuse herself from this case because (1) she was the United States Attorney for the Western District of Oklahoma at a time when that office litigated a similar case, and (2) she con-

ducted the case improperly, giving the appearance of partiality. Those factbound contentions are erroneous.

a. A federal judge must recuse herself "in any proceeding in which [her] impartiality might reasonably be questioned." 28 U.S.C. 455(a). The standard is whether "it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation." *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988). In the instant case, the federal government's district court filing in opposition to petitioners' disqualification motion stated that "[a]lthough Judge Miles-LaGrange was U.S. Attorney at the time of the litigation of the [prior] case, she was not the attorney who drafted the pleadings or appeared as the attorney of record in that action. Rather, several Assistant U.S. Attorneys, including the undersigned counsel, appeared in the action in defending the federal officials named as defendants." Federal Defendants' Special Appearance and Response in Opposition to Plaintiffs' Motion for Disqualification and Brief in Support Thereof at 4 (filed Sept. 16, 1997); see also *id.* at 5 ("to the best of undersigned counsel's memory at least from the time that he joined the U.S. Attorney's Office in August of 1994, Vicki Miles-LaGrange, while she was U.S. Attorney, did not actively participate in the [prior] case, draft any pleadings, or argue any motions concerning the action").[5] In the court of appeals, petitioners "expressly disavow[ed] any knowledge that the district court judge personally participated in any way in the particular prior case." Pet.

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[5] Thus, while the district judge "did not create a record or document her decision not to recuse," Pet. App. 13, the record does contain the representation of government counsel that Judge Miles-LaGrange was not actively involved in the prior litigation.

App. 14. And petitioners cite no authority suggesting that a federal judge who previously served as a United States Attorney must recuse herself from all cases raising legal issues similar to those litigated by her office during that prior period of service.

Petitioners' second asserted ground for recusal also lacks merit. The court of appeals correctly noted that "merely adverse rulings can almost never constitute grounds for disqualification." Pet. App. 14. Petitioners contend (Pet. 26-30) that their recusal motion is based on the timing rather than the content of the district court's rulings (and, to some extent, on the district court's failure to act in a timely fashion). As the court of appeals explained, however, petitioners "cite no authority for their claim that the time and manner of [the district court's] rulings creates a reasonable doubt about impartiality, absent any other indicia of bias or partiality." Pet. App. 14.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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MAY 2000